BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

ROGER DICKEY, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	Case No. DEMO-00-0018 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and GERALD L. MORGEN, Vice Chair. The hearing was held at the Department of Labor and Industries Office, N. 901 Monroe, Spokane, Washington, on January 31, March 28, June 11, June 12, October 22 and October 23, 2002. The parties submitted written closing argument on November 22, 2002.

1.2 **Appearances.** Appellant Roger Dickey appeared *pro se*. Mickey Newberry, Assistant Attorney General, represented Respondent Department of Labor and Industries.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of demotion for neglect of duty, inefficiency, insubordination, malfeasance, gross misconduct and willful violation of department rules and regulations. Respondent alleges that Appellant failed to complete evaluations on probationary employees and failed to provide them with adequate training; failed to ensure that

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subordinates completed inspections in a reasonable time period; altered written reports completed by his subordinates and failed to discuss the changes with them; failed to comply with a supervisory directive that he submit the status of ten inspections; and that he appointed an inexperienced investigator to conduct a high profile and complicated health and safety inspection.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed,* 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997); Countryman v. Dep't of Social & Health Services, PAB No. D94-025 (1995); Parramore v. Dep't of Social & Health Services, PAB No. D94-135 (1995); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

II. FINDINGS OF FACT

2.1 Appellant Roger Dickey was a Safety and Health Specialist 2 and permanent employee for Respondent Department of Labor and Industries. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on October 20, 2000.

2.2 By letter dated September 6, 2000, Kelly Honeychurch, Regional Administrator, informed Appellant of his demotion from his position as a Safety and Health Specialist 4 to a position as a Safety and Health Specialist 2 effective September 22, 2000. Ms. Honeychurch charged Appellant with neglect of duty, inefficiency, insubordination, malfeasance, gross misconduct and willful violation of department rules and regulations. Ms. Honeychurch specifically alleged that Appellant failed to complete evaluations on probationary employees and failed to provide them with adequate training; failed to ensure that subordinates completed inspections in a reasonable time period; that

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he altered written reports completed by his subordinates and failed to discuss the changes with them; that he failed to comply with a supervisory directive that he submit the status of ten inspections; and that he appointed an inexperienced investigator to conduct a high profile and complicated health and safety inspection.

2.3 Appellant began his employment with the Department of Labor and Industries (L&I) in 1986. Appellant had no prior history of disciplinary corrective actions. However, Appellant's performance evaluation addressed his need to meet deadlines. During his tenure with L&I, Appellant held a number of positions within the department, including status as a Safety and Health Inspector, various levels as a Safety and Health Specialist, and Regional Hearing Officer.

2.4 On April 1, 1999, Appellant transferred to Region 6 (Spokane Regional office) as a Safety and Health Specialist 4, supervising staff in the Consultation Unit. Compliance Manager Rich Ervin became Appellant's direct supervisor. At the time he hired Appellant, Mr. Ervin addressed two specific concerns he had regarding Appellant's ability to efficiently and effectively manage his work time. Mr. Ervin devised a system where he assigned Appellant assignments and then periodically asked for the status of the work as a way to help Appellant better manage his time.

2.5 As the supervisor of the Consultation Unit, Appellant was responsible for supervising several Safety and Health Inspectors. In addition, the following employees were hired as inspectors under Appellant's supervision: Tom Anselmo (started on May 3, 1999); Gary Newbry (started on June 28, 1999) and Steve Belnap (now Halpain) and Debbie Haige (both started on September 22, 1999). Appellant was required to complete probationary trial evaluations for each of these employees pursuant to the agency's adopted Policy 3.08, which requires supervisors to evaluate a trial service or probationary period employee prior to the employee attaining permanent status.

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2.6 As a supervisor, Appellant was also responsible for training the new inspectors in conducting inspections of employer job sites and premises, identifying and documenting safety hazards and preparing violation worksheets (WISHA-1).

2.7 At the time Appellant was the supervisor of the Consultation Unit, the standard practice for safety inspectors was to complete all final investigation reports by the end of the month in which the inspection was conducted. Completed inspection reports are submitted to the Integrated Management Information System (IMIS) with L&I Headquarters in Tumwater, Washington.

2.8 Staff with IMIS enter the report and violation data in the computer system and the computer generates the official violation notices/citations which are mailed to the business owners. Under Washington law, the employer/business owner is not responsible for paying the penalty or fixing the violation if the violation notice is not served within 180 days from the date the violation was discovered. Therefore, timely submission of the WISHA-1 is critical, otherwise business owners cannot be held responsible for violations.

2.9 In addition to reviewing his subordinates' inspection reports prior to their submission to IMIS, Appellant carried his own case load of inspections and was required to complete and submit his inspection reports to IMIS. By memo dated December 8, 1999, Mr. Ervin, addressed Appellant's backlog of cases and reminded him of the due date for a number of reports Appellant had not prepared. Mr. Ervin also reminded Appellant to complete his staff evaluations on time.

2.10 By memo dated December 15, 1999, Mr. Ervin wrote Appellant about the following 10 inspection reports assigned to him that were seriously overdue:

1. Eller Corp.
2. Hoffman Contractors
3. Shea Const.

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4. C&R Plumbing
5. Johnson Masonry
6. Rays Demolition
7. Kaiser Alum
8. Robert Goebel
9. Ken Spilker Masonry
10. Conseal Enterprises

Mr. Ervin directed Appellant to get all of the inspection reports completed and he emphasized that they were due out by the end of the week (December 17, 1999). However, Appellant failed to produce the reports by December 17, 1999.

2.11 In a second memo dated December 15, 1999, Mr. Ervin addressed four inspections (Town of Creston; Pupo's Produce; Eagle Systems; and CM Tile Roofing) assigned to Appellant's subordinates, which were beyond 60 days from opening, and he asked Appellant to submit the reports.

2.12 Mr. Ervin transferred out of the L&I Spokane office on December 31, 1999, and in January 2000, Daniel Aga was appointed as the new Compliance Manager with supervisory responsibility over Appellant.

2.13 Mr. Aga began to note that Appellant's caseload contained numerous overdue inspection reports. On March 1, 2002, Mr. Aga met with Appellant to address several issues of concern. Mr. Aga addressed Appellant's unacceptable backlog of inspection reports and Appellant's failure to review his subordinates' written inspection reports. Mr. Aga directed Appellant to complete written inspection reports as soon as possible and to issue inspection result letters within 15 calendar days of closing a non-citation complaint or within 15 days of when a citation is issued. Mr. Aga also reminded Appellant that it was critical that he perform evaluations for his new employees.

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2.14 On March 3, 2000, Appellant emailed Mr. Aga outlining an action plan to reduce the backlog of overdue reports and to have them completed by the end of March. Appellant also agreed to conduct field visits with each of his four new employees to prepare for their evaluations and to have the evaluations completed by April 15, 2000.

2.15 On April 3, 2000, Appellant provided Mr. Aga with a physician's note. The note indicated that Appellant needed two months of leave for medical reasons, starting in two weeks. Mr. Aga advised Appellant to start his leave immediately, if it was necessary, but Appellant insisted on working. This physician's note was the first formal notice that the department received which indicated that Appellant was experiencing medical problems. Although Appellant had made mention during informal conversations at work of his medical condition and problems he was experiencing with diabetes, he did not make his employer aware that he was unable to perform the essential functions of his position or of the need for any accommodation.

2.16 On April 10, 2000, Appellant and inspector Steve Belnap submitted a final inspection report for review by L&I technical services regarding a serious accident that occurred on October 15, 1999, at the Dellen Wood Plant. As a result of that accident, an employee sustained a serious injury which resulted in the amputation of an arm. Appellant initially assigned an experienced inspector, Steve Brooks, to work with Mr. Belnap, who had been hired on September 29, 1999, as a new inspector for L&I. Shortly after the initial visit to the plant, Appellant removed Mr. Brooks from the inspection and left Mr. Belnap as the only inspector assigned to complete the accident inspection as well as to conduct a comprehensive inspection of the premises. However, at times, other inspectors went to the site with Mr. Belnap to help conduct interviews and gather evidence.

2.17 Based on Mr. Belnap's need for training, Appellant decided to have Mr. Belnap deal with the accident investigation first. Appellant delayed the comprehensive investigation until December

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6, so that Mr. Belnap could attend inspector training courses. As a result of the delay, the department had to obtain a warrant to search the Dellon Wood Plant premises because the employer objected to the comprehensive inspection. The warrant issued required the inspection to be completed within 10 days. The plant was located in a large, two-story building that contained hundreds of pieces of machinery and equipment, and as a result, Mr. Belnap had to work quickly in order to complete the comprehensive investigation before Christmas 1999. During the course of the investigation, approximately 50 to 60 violations were discovered. After the investigation was completed, Mr. Belnap spent time on gathering and organizing the information in order to support the observed violations. During the time the Dellon Wood accident investigation was assigned to Mr. Belnap, Appellant failed to provide him with appropriate supervision and guidance. In addition, Appellant failed to promptly review violation reports submitted to him by Mr. Belnap, which caused undue delays in completing the investigation and the report writing process.

2.18 The final Dellon Wood inspection report was reviewed by staff from headquarters, who spent three days reviewing and revising the report in order for the citations to be issued in a timely manner. On April 13, 2000, the finalized report was given to Appellant for his signature. Appellant disagreed with some of the citations listed and he made changes to the citations. As a result, the revisions raised the citation amount to over $100,000, an amount which requires a mandatory review by the Director of L&I, and which would have delayed submitting the citations to Dellon Wood within the 180 day deadline. As a result, the citations were mailed without the Director-level review in order to preserve timeliness of the report which had to be issued on April 14, 2000.

2.19 On April 11, 2000, Appellant completed the annual evaluation for Mr. Anselmo; however, Appellant failed to complete probationary period evaluations for Mr. Belnap, Mr. Newbry or Ms. Haige, who all became permanent employees without having had their performance evaluated.

2.20 Appellant was on a medical leave of absence effective April 14 through June 19, 2000. During that period of time, Will Skews filled in as the supervisor of Appellant's unit. During that time, Mr. Skews noted numerous deficiencies in Appellant's performance and he and Mr. Aga worked together to resolve them.

2.21 Mr. Aga subsequently met with the appointing authority, Kelly Honeychurch, to address his concerns with Appellant's failure to adequately perform his job. Ms. Honeychurch directed Mr. Aga to conduct a review of Appellant's work and to document all problems and report back to her. After the investigation was completed, Ms. Honeychurch reviewed the results and felt there was sufficient misconduct to warrant disciplinary action. She issued a pre-determination letter to Appellant on July 10, 2000, outlining the charges against him.

2.22 On July 17, 2000, Ms. Honeychurch met with Appellant at a pre-determination meeting to discuss the allegations. Ms. Honeychurch also reviewed several written responses to the charges from Appellant, and following the July 17 meeting, she conducted additional interviews to clarify issues raised by Appellant. As a result, Ms. Honeychurch dropped several of the allegations because they could not be substantiated.

2.23 Ms. Honeychurch, however, issued a second pre-determination letter advising Appellant of two additional charges. The first charge concerned Hoerner Construction, a subcontractor for Hoffman Construction. In that case, Hoerner Construction had been inspected at the Hoffman work site and violations were noted. Appellant's subordinate, Mr. Newbry, completed the inspection forms which documented the observed violations which should have been cited. Mr. Newbry submitted the forms to Appellant for review and submission to IMIS. However, the inspection report was never turned in to IMIS for processing, therefore, the citations were never issued.

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2.24 Ms. Honeychurch felt that the discovery on the Hoerner Construction report brought into question the Hoffman Construction inspection report, because Hoffman Construction should have also been held liable for safety violations made by its subcontractors. After reviewing the pertinent documentation, Ms. Honeychurch noted that a reference in Mr. Newbry's report about citing Hoffman Construction had been altered. Ms. Honeychurch concluded that Appellant purposefully altered Mr. Newbry's Hoffman Construction inspection report before submitting it to IMIS in order to cover-up the fact that he had failed to follow through with the Hoerner Construction inspection. Ms. Honeychurch scheduled a second meeting with Appellant, who declined to attend.

2.25 In determining the level of discipline, Ms. Honeychurch reviewed the investigative results, the supporting documentation and Appellant's written statements. Ms. Honeychurch also considered Appellant's response to the charges, including his explanations regarding how his medical condition negatively affected his ability to function in the workplace.

2.26 Ms. Honeychurch concluded that Appellant demonstrated poor judgment, lost and altered documents, and refused to take responsibility for his misconduct. Although Ms. Honeychurch felt that termination was the appropriate sanction based on the numerous founded charges, she took into consideration Appellant's physical condition as a mitigating factor. Although she felt that Appellant's medical condition did not excuse his misconduct, she determined that demotion to a position where he would not have supervisory responsibility would be appropriate. Ms. Honeychurch further felt that without notice of Appellant's medical condition and an opportunity to assist or accommodate him during the time in question here, there was nothing she could do but hold Appellant responsible for his misconduct, even if that misconduct resulted from Appellant's failure to properly manage his medical condition.

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III. MOTION

3.1 As a preliminary matter at the outset of the hearing on June 12, 2002, Respondent made a motion to withdraw charges 3.1, 3.2, 3.3 and 3.4 on page six of the disciplinary letter. Respondent argued that it discovered documentation which the appointing authority did not have available at the time she imposed the discipline against Appellant. Respondent argues that a review of these documents indicated that the department did not have the evidence sufficient to support charges 3.1, 3.2, 3.3 and 3.4.

3.2 Appellant objected to the withdrawal of charges, arguing that the department had the opportunity to review the documents, that the charges were addressed in his written responses, but that the agency conducted a "sloppy" investigation and chose to move forward with the charges. Appellant argues that Respondent should not be allowed to remove from the Board's review charges that were considered by the appointing authority and used to support her decision to demote him.

3.3 The Board denied Respondent's motion, citing WAC 356-34-070, which imposes a time limitation during which the appointing authority may withdraw or modify any the disciplinary action prior to the commencement of the hearing on an appeal.

IV. ARGUMENTS OF THE PARTIES

4.1 Respondent argues that it has met its burden of proving by a preponderance of the evidence the causes of neglect of duty, inefficiency, insubordination, malfeasance, gross misconduct and willful violation of department policy, rules, and regulations. Respondent argues that Appellant admits to most of the charges contained in the disciplinary letter and admits he committed misconduct. Respondent argues, however, that Appellant failed to take responsibility for his misconduct and instead attempted to deflect blame on other individuals. Respondent argues that

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none of Appellant's defense excuses him from responsibility for his misconduct. Respondent also contends that it was Appellant's responsibility to manage his medical condition so that it would not interfere with his ability to do his job and that he failed to inform his employer of his condition until April 3, 2000, well after the misconduct was committed.

Respondent argues that, as an employer, it had no responsibility to accommodate an employee with a medical condition until it received notice that the medical condition was affecting the employee's ability to perform the essential functions of his/her job. Respondent further argues that prior Board decisions and Washington law do not require an employer to overlook misconduct, even if the employer has knowledge of a medical condition.

4.2 Appellant admits that there were problems with his performance but denies there were as many problems as the department alleged. Appellant denies that his actions were intentional, and he asserts that they were the result of his illness and medical condition and poor supervision he was receiving. Appellant alleges that the department failed to provide him with adequate training, guidance and supervision before, during and in response to the deficiencies occurring. Appellant argues that the department also failed to provide him with appropriate counseling and corrective measures to correct the deficiencies but moved directly to the last step of the disciplinary process.

Appellant asserts that failure to timely evaluate employees was common in the Region 6 office, but he asserts that he was singled out and treated unfairly for failing to complete his subordinates' evaluations on time. Appellant admits that all of the 10 inspection reports went to the legal limit of time when they should not have, but he asserts that it was the result of his illness and not a willful action on his part. Appellant argues that Respondent presented no evidence to support the charges related to late reports by his subordinates. Appellant asserts that the Dellon Wood Plant investigation would have been a horrendous project under the best of circumstances and he admits that he made mistakes. Appellant asserts, however, that he was in a state of near total

mental paralysis and confusion which resulted in his failure to adequately support the report writing process. Therefore, Appellant asks that his appeal be granted.

V. CONCLUSIONS OF LAW

5.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

5.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

5.3 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

5.4 Inefficiency is the utilization of time and resources in an unproductive manner, the ineffective use of time and resources, the wasteful use of time, energy, or materials, or the lack of effective operations as measured by a comparison of production with use of resources, using some objective criteria. Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997).

5.5 Insubordination is the refusal to comply with a lawful order or directive given by a superior and is defined as not submitting to authority, willful disrespect, or disobedience. Countryman v. Dep't of Social & Health Services, PAB No. D94-025 (1995).

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5.6 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

5.7 Willful violation of published employing agency or institution or Personnel Resources Board rules or regulations is established by facts showing the existence and publication of the rules or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

5.8 Respondent has met its burden of proving by a preponderance of the credible evidence that Appellant failed to timely complete evaluations on three of his probationary employees and that he failed to provide them with adequate training. Appellant argues that the region did not have a strict standard on completing employee evaluations. However, in this case, Appellant was given specific directives to complete these evaluations and his failure to do so constitutes a neglect of his duty, insubordination and willful violation of agency Policy 3.08.

5.9 Respondent has failed to prove by a preponderance of the credible evidence the charge that Appellant did not ensure that his subordinates completed inspections on the Town of Creston; Pupo's Produce; Eagle Systems; and CM Tile Roofing in a reasonable time period.

5.10 Respondent has met its burden of proving by a preponderance of the credible evidence that Appellant failed to comply with a supervisory directive that he submit the status of ten inspections assigned to him. Again, Appellant was given numerous directives to submit these reports, and by his own admission, he recognizes these reports should not have gone beyond the time limits. Appellant's failure to meet the performance standards required of his position constitutes a neglect of duty, an inefficient use of his work time and rises to the level of gross misconduct because it

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interfered with the agency's mission to timely notify employers/businesses of workplace hazards and violations. Furthermore, Appellant was insubordinate when he failed to comply with supervisory directives to submit the status of the inspections.

5.11 Respondent has met its burden of proving by a preponderance of the credible evidence that Appellant appointed an inexperienced investigator to conduct a high profile and complicated health and safety inspection on the Dellon Wood Plant case. Appellant's failure to ensure that the Dellon Wood investigation was managed appropriately by an experienced inspector created undue delays in the completion of the investigation and the subsequent reports. Furthermore, Appellant's delays in reviewing Mr. Belnap's reports and returning them in a timely fashion hindered Mr. Belnap's ability to move forward and complete the report sooner. The report ultimately submitted was substandard and required numerous, last minute changes by L&I auditors, who had to move quickly at the last minute in order to issue the report within the requisite timeframe. Appellant's poor performance and lack of adequate supervision on the case constitutes a neglect of duty and inefficiency and rises to the level of gross misconduct.

5.12 Respondent has met its burden of proving that Appellant neglected his duty when he failed to submit the Hoerner Construction report after Mr. Newbry submitted it to him for review. Appellant's failure to submit the report to IMIS prohibited the department from issuing violations against the company and interfered with the department's ability to ensure that safety violations are brought to the attention of and are remedied by businesses and employers. However, Respondent has failed to prove by a preponderance of the credible evidence that the alterations made on the Hoffman Construction report were made by Appellant.

5.13 Malfeasance is the commission of an unlawful act, the act of doing what one ought not to do, or the performance of an act that ought not to be done, that affects, interrupts, or interferes with

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the performance of official duty. Parramore v Dep't of Social & Health Services, PAB No. D94-135 (1995).

5.14 Respondent has failed to prove by the preponderance of the credible evidence that any of Appellant's performance problems and deficiencies constituted malfeasance.

5.15 In determining whether a sanction imposed is appropriate, consideration must be given to the facts and circumstances, including the seriousness and circumstances of the offenses. The penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the program. An action does not necessarily fail if one cause is not sustained unless the entire action depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

5.16 To mitigate his poor performance and/or lack of performance, Appellant raises the issue of his medical condition, diabetes. The Board has dealt with a similar issue in Maxwell v. Dep't of Corrections, 91 Wn. App. 171, 956 P.2d 1110 (1998). In that case, Mr. Maxwell, who was also a diabetic, claimed that his admitted misconduct should have been excused because it was caused by his medical condition. Mr. Maxwell presented testimony from a physician that his glucose levels were probably high during the month in which his misconduct occurred, and that such levels could lead to the general type of behavior exhibited by Mr. Maxwell that led to his dismissal. Id.

5.17 The Courts of Appeals upheld the PAB's determination that without evidence that Mr. Maxwell's condition caused his behavior, he cannot show he was disciplined because of his condition or discriminated against because of his condition. Id. At 178. The Court stated that Maxwell had the burden of proving his defense and upheld the PAB's recognition that, while the testimony relating to the condition of diabetes was informative, that no conclusive evidence was

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presented that supported Maxwell's claims that his actions were solely the result of his diabetes or his medication. Id. At 177.

5.18 Therefore, we continue to hold, as we did in Maxwell, that in the absence of such conclusive evidence, this Board should not consider an employee's medical condition as a basis upon which to reverse the department's disciplinary action. Furthermore, there is no evidence that Appellant was demoted because of his diabetes. Appellant was demoted because of his substandard and deficient performance as a Safety and Health Specialist 4 and as a supervisor.

5.19 Appellant worked for the department for a number of years and, as a Safety and health Specialist 4, he was in a position of high responsibility. Appellant's supervisors gave him specific instructions regarding work expectations and deadlines. Appellant's medical condition is a fact that was considered by the appointing authority when imposing the discipline. This Board has also considered this fact in determining whether the sanction imposed here was too severe.

5.20 Even when considering the number of unproven allegations, we cannot conclude that the appointing authority's decision to demote Appellant was too severe. Under the facts and circumstances of this case, we conclude that Appellant's performance was deficient enough to warrant demotion to a non-supervisory position as a Safety and Health Specialist 2. Therefore, the demotion should be upheld, and the appeal of Roger Dickey should be denied.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Roger Dickey is denied.

DATED this _____ day of _____, 2003.

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WASHINGTON STATE PERSONNEL APPEALS BOARD

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Walter T. Hubbard, Chair

_____

Gerald L. Morgen, Vice Chair

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